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No. 10-1038

In the Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND PETER Y. ATKINSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals misapplied harmless error review in determining that the district court's instructional error on the honest services theory of mail fraud did not require reversal of petitioners' convictions on one of the mail fraud counts.

2. Whether the court of appeals erred in concluding that the instructional error on honest services fraud did not require reversal of petitioner Black's conviction on the separate charge of obstruction of justice.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 625 F.3d 386. An earlier opinion of the court of appeals (Pet. App. 17a-33a) is reported at 530 F.3d 596.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 2010. A petition for rehearing was denied on December 17, 2010 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on February 17, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were each convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346. Petitioner Black was also convicted of obstructing justice, in violation of 18 U.S.C. 1512(c)(1). Black was sentenced to 78 months in prison, petitioner Boultbee to 27 months, and petitioner Atkinson to 24 months. The court of appeals affirmed their convictions. Pet. App. 17a-33a. This Court vacated the judgment and remanded the case for reconsideration. 130 S. Ct. 2963 (2010). On remand, the court of appeals reversed petitioners' convictions on two of the mail fraud counts; affirmed petitioners' convictions on the third mail fraud count; affirmed Black's conviction for obstruction of justice; and vacated the sentences and remanded for resentencing. Pet. App. 1a-14a.[1]

1. Black was Chief Executive Officer and Chairman of the Board of Hollinger International, Inc. (Hollinger), a publicly traded company that owns newspapers. Boultbee and Atkinson were also senior executives of Hollinger. Pet. App. 18a; Nos. 07-4080, 08-1030, 08-1072, 08-1106 Gov't C.A. Separate App. 531-533 (Gov't C.A. App. *Black I*).

Hollinger was controlled by a Canadian company called Ravelston, in which Black owned a majority stake. Boultbee and Atkinson, as well as F. David Radler, another Hollinger executive, also owned stock in Ravelston. Black, Boultbee, Atkinson, and Radler were not

[1] Boultbee and Atkinson have each been resentenced to time served. No. 05-CR-727 Docket entry No. 1182 (N.D. Ill. Mar. 24, 2011); *id.* Docket entry No. 1184 (N.D. Ill. Apr. 4, 2011). Black's resentencing is currently scheduled for June 24, 2011. *Id.* Docket entry No. 1168 (N.D. Ill. Jan. 13, 2011).

paid directly by Hollinger but instead by Ravelston, which received management fees from Hollinger in exchange for their services. Pet. App. 18a; Gov't C.A. App. *Black I* 53-56 , 60-67, 212, 553, 557.

In 1998, Hollinger began selling many of its small community newspapers. In connection with those sales, Hollinger frequently executed non-competition agreements in which it promised the purchaser that it would not operate a newspaper near the newspapers it sold for a certain period of time after the sale. Petitioners used purported non-competition agreements to pay themselves millions in fees that Hollinger did not authorize for that purpose, from funds that would otherwise have gone to Hollinger. Pet. App. 8a, 11a-12a, 18a-20a; No. 05-CR-727, 2007 WL 3254452, at *4-*9 (N.D. Ill. Nov. 5, 2007); Gov't Exh.-Board-1B; 4/24/07 Tr. 5435-5439; 5/2/07 Tr. 7112.

The APC Scheme. One of petitioners' schemes involved a Hollinger subsidiary called APC, which was in the process of selling the newspapers it owned. When APC had only one newspaper left—-a weekly community newspaper in Mammoth Lake, California--co-defendant Mark S. Kipnis, another Hollinger executive, prepared and signed on behalf of APC an agreement that paid $5.5 million to Black, Boultbee, Atkinson, and Radler, purportedly in exchange for their promises not to compete with APC or its affiliates for three years after they stopped working for Hollinger. Unlike the non-competition agreements executed by Hollinger, the APC agreement was not linked to the sale of any newspapers. Instead, it involved freestanding promises by Black and the others not to compete with a company that they themselves owned. When the agreement was executed, no reasonable probability existed that they would start

a newspaper in Mammoth Lake (population approximately 7000). The checks for $5.5 million were backdated to the year in which APC sold most of its newspapers in order to make the phony non-competition payments seem more plausible. Petitioners did not disclose the transaction to either Hollinger's board of directors or its audit committee, which was required to approve transactions between Hollinger executives and the company (or its subsidiaries) because of conflict-of-interest concerns. Pet. App. 8a-9a, 18a-20a; No. 08-876 J.A. 106a-107a, 123a-124a, 153a-158a (J.A. *Black I*); Gov't C.A. App. *Black I* 127-128, 182, 196-201, 205-206, 208-209, 214, 398, 403, 408, 413, 420, 539, 568, 599.

The Forum/Paxton Scheme. Another scheme involved the payment of $600,000 in proceeds from the sale of newspapers to Forum Communications Co. and Paxton. Neither Forum nor Paxton requested non-competition agreements with individual executives in connection with those sales, and none was ever executed.[2] Instead, after a phone conversation with Black, Radler inquired whether any funds from the sales had been set aside for individual non-competition agreements. Radler learned that no money had been set aside for that purpose, because no non-competition agreements had been executed, but that $600,000 remained from the sale. Black and Radler then agreed that Radler would divide the money among Black, Radler, Atkinson, and Boultbee, according to the same formula used to divide past non-competition payments. Even though these pay-

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[2] Based on a joke that Radler made in a note to petitioners, Pet. App. 320a; see p. 10 & note 4, *infra*, petitioners assert (Pet. 6) that Forum and Paxton requested individual non-competition agreements. But the officers of the companies testified precisely the opposite, J.A. *Black I* 35a-39a, 42a-47a, as did Radler himself, Pet. App. 190a.

ments were related-party transactions, petitioners did not seek approval from the audit committee. Pet. App. 11a-12a; J.A. *Black I* 35a-39a, 42a-47a, 104a-107a, 111a-115a, 123a-125a, 140a-153a; Gov't C.A. App. *Black I* 604, 609; 4/25/07 Tr. 5510, 5531-5532, 5541-5542; 4/27/07 Tr. 6059; 5/1/07 Tr. 6624.[3]

Black's Obstruction of Justice. As the fraud scheme came to light, the Securities and Exchange Commission (SEC), as well as law enforcement authorities and a federal grand jury, opened investigations into petitioners' conduct. Black was aware of those proceedings. Although many documents had already been subpoenaed, on approximately May 19, 2005, the SEC sought additional documents from Black. On May 20, Black, along with his personal assistant, removed from his office 13 boxes of documents including some relevant to the pending proceedings. After his assistant contacted Black to inform him that she had been prevented from removing the boxes, Black drove to the building with his chauffeur and parked in a location where he did not typically park. Black, his assistant, and the chauffeur then removed the boxes from a back stairway. A security video showed Black pointing out cameras in certain parts of the building. Unbeknownst to Black and his assistant, another video camera captured Black remov-

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[3] Petitioners incorrectly contend (Pet. 8) that when Radler ordered the payments, he believed that individual non-competition agreements had been executed. In fact, Radler testified that he and Black ordered the payments only *after* he learned that "nothing had been done" and "there [were] no non-competes." J.A. *Black I* 148a-149a. Radler further testified that he did not advise the Board or its audit committee about the payments because Forum and Paxton had not requested individual non-competition agreements and he "knew" the "payment was wrong." Pet. App. 190a; see p. 19, *infra*.

ing the boxes. Pet. App. 4a, 28a; 2007 WL 3254452, at *13; Gov't C.A. App. *Black I* 273-276, 284, 312-316, 318, 639, 646, 654; 5/31/07 Tr. 11,413, 11,500, 11,506.

2. Petitioners were charged with, among other crimes, multiple counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346. Pet. App. 36a-66a, 68a-89a. In addition, Black was charged with obstruction of justice, in violation of 18 U.S.C. 1512(c)(1). Pet. App. 104a-109a. The indictment alleged, and the government proceeded, on two overlapping theories on the mail fraud counts: (1) that petitioners stole money from Hollinger by fraudulently paying themselves bogus and unapproved non-competition payments; and (2) that, in making the payments to themselves and failing to disclose them, petitioners deprived Hollinger of their honest services as managers of the company. *Id.* at 37a-42a, 47a-48a, 56a-59a, 63a-65a. The district court instructed the jury that it could find petitioners guilty under either theory. *Id.* at 306a. Because petitioners objected to the use of a special verdict form, the jury rendered only a general verdict on the mail fraud counts. *Id.* at 26a-27a. The jury found petitioners guilty on two mail fraud counts involving the APC scheme and one mail fraud count involving the Forum/Paxton scheme. 2007 WL 3254452, at *3. The jury also found Black guilty of obstruction of justice. *Ibid.* The jury acquitted petitioners and Kipnis on several other mail fraud counts, two of which involved the Forum/Paxton scheme. Unlike the Forum/Paxton count on which the jury found petitioners guilty, the Forum/Paxton counts on which the jury acquitted involved non-competition agreements that were actually executed, and those agreements were with Hollinger's holding company rather than petitioners. *Ibid.*; Pet. App. 13a, 57a; J.A. *Black I* 38a, 40a-42a.

3. On appeal, petitioners contended that the district court committed various instructional errors, including giving an incorrect instruction on honest services fraud. Petitioners also contended that the evidence was insufficient to support their convictions. The court of appeals rejected petitioners' claims. Pet. App. 17a-33a.

4. Petitioners sought this Court's review, and the Court granted their petition for a writ of certiorari and vacated the judgment of the court of appeals. 130 S. Ct. 2963 (2010). The Court relied on its decision the same day in *Skilling* v. *United States*, 130 S. Ct. 2896 (2010), which held that the honest services component of the mail fraud statute criminalizes only schemes involving bribes and kickbacks. The Court concluded that its holding in *Skilling* established the invalidity of the honest services instructions in this case, which did not require the jury to find that petitioners' offenses involved bribes or kickbacks. 130 S. Ct. at 2968. The Court remanded the case to the court of appeals for that court to determine whether the instructional error was harmless. *Id.* at 2970. The Court also left for the court of appeals on remand Black's claim "that spillover prejudice from evidence introduced on the mail-fraud counts requires reversal of his obstruction-of-justice conviction." *Id.* at 2970 n.14.

5. On remand, the court of appeals reversed petitioners' convictions on the APC mail fraud counts, affirmed their convictions on the Forum/Paxton mail fraud count, and affirmed Black's obstruction-of-justice conviction. Pet. App. 1a-14a.

a. The court of appeals first rejected Black's "prejudicial spillover" challenge to his obstruction-of-justice conviction. Pet. App. 3a-8a. The court observed that, because the jury was separately instructed on obstruc-

tion, its receipt of an erroneous instruction on the fraud charges would "ordinarily be irrelevant." *Id.* at 6a. The court recognized, however, that, if an erroneous instruction on one count is apt to have tainted the jury's consideration of other counts as well, a defendant may be entitled to a new trial on those counts. *Ibid.* The court then determined that there was no such taint here. The court explained that "[t]he theory of honest-services fraud submitted to the jury was esoteric rather than inflammatory; the evidence of such fraud was a subset of the evidence of pecuniary fraud; and the evidence of obstruction of justice was very strong." *Ibid.* The court therefore concluded that "[n]o reasonable jury could have acquitted Black of obstruction if only it had not been instructed on honest-services fraud." *Ibid.*

The court rejected Black's contention that the jury would not have concluded that he acted with the requisite corrupt intent in removing documents from his office if it had known that the conduct being investigated did not constitute honest services fraud. Pet. App. 6a-8a. The court explained that "Black was not under investigation for an obviously nonexistent crime * * * ; he was under investigation for conventional pecuniary fraud as well as honest-services fraud." *Id.* at 7a. Black "could not have known that years later the Supreme Court would invalidate" the honest services fraud charge. *Ibid.* "And if he were clairvoyant," the court observed, "he would have known that the other fraud charge—pecuniary fraud—would not be invalidated." *Ibid.*

b. The court of appeals next addressed whether the district court's instructional error on honest services fraud required reversal of petitioners' mail fraud convictions on the APC counts. Pet. App. 8a-11a. The court

noted that those convictions could have rested on either or both of two legal theories—honest services fraud and traditional pecuniary fraud. *Id.* at 9a. Although the instructions on honest services fraud were flawed, the instructions on pecuniary fraud were correct. *Ibid.* The court explained that, even though the jury's general verdict did not specify on which theory or theories the jury had relied, the instructional error was nonetheless subject to harmless error review. See *id.* at 2a-3a. Relying on this Court's decisions in *Hedgpeth* v. *Pulido*, 129 S. Ct. 530, 531-532 (2008) (per curiam), and *Neder* v. *United States*, 527 U.S. 1, 15-16 (1999), the court of appeals stated the applicable harmless error test as follows: "[I]f it is not open to reasonable doubt that a reasonable jury would have convicted [petitioners] of pecuniary fraud, the convictions on the fraud counts will stand." Pet. App. 3a.

Accordingly, the court defined the question before it as "whether a reasonable jury might have convicted the defendants of depriving the company of their honest services for private gain but not have convicted them of pecuniary fraud." Pet. App. 9a-10a. The court concluded that this scenario was "unlikely" but that "no stronger assertion was possible." *Id.* at 10a. The court explained that petitioners' defense at trial was that the $5.5 million they received from APC represented management fees owed them by Hollinger and that they had characterized the fees as non-competition payments in the hope that Canada might not treat the fees as taxable income. *Id.* at 8a-9a. The court noted that "[t]here was plenty of evidence that Hollinger did not owe [petitioners] $5.5 million in management fees, but the evidence was not conclusive, while all that the jury had to find in order to convict them of honest-services fraud was their

failure to level with the board and audit committee, which was irrefutable." *Id.* at 10a. The court therefore reversed petitioners' convictions on the APC counts. *Id.* at 14a.

c. Last, the court of appeals addressed whether the instructional error on honest services fraud required reversal of petitioners' convictions on the Forum/Paxton count. Pet. App. 11a-14a. The court noted that petitioners did not contend that the $600,000 they had paid themselves from the Forum/Paxton transaction constituted management fees owed them by Hollinger. Petitioners instead contended the money was compensation for *bona fide* agreements not to compete with the community newspapers that Hollinger had sold to Forum and Paxton. *Id.* at 11a. The court observed that petitioners' contention was "implausible" for multiple reasons, including that petitioners "could have no interest in going into competition with [Forum and Paxton] as individuals," *ibid.*; the owners of Forum and Paxton, who were disinterested witnesses, testified that they did not request any agreements, *ibid.*; and a "clowning note" from Radler to petitioners "implicit[ly] boast[ed] that the covenants were fabrications." *Id.* at 11a-12a, 13a; see note 2, *supra*.[4]

What made petitioners' contention "decisively unbelievable," the court observed, was that no non-competition covenants actually existed. Pet. App. 12a.

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[4] The note stated, in pertinent part, that Forum and Paxton had "asked for a 5-year non-compete from [Black] and me covering not only the states wherein they purchased assets but those states that border the said states. This would leave us only Alaska, Wyoming and Louisiana for us to continue our activities * * * . I have been assured there is [sic] suitable accommodations four [sic] our new headquarters in Casper, Wyoming." Pet. App. 11a-12a.

That fact alone, the court reasoned, "fatally undermine[d]" petitioner's challenge to their Forum/Paxton fraud convictions. *Ibid.* The court explained that "[e]ither the failure to prepare covenants was an innocent mistake," as petitioners contended, in which case the jury could not reasonably have found petitioners guilty of fraud under either an honest services or a pecuniary fraud theory; "or no covenants were intended, and the fees were part of the purchase price of the newspapers, owed to Hollinger and stolen by [petitioners]," in which case petitioners were guilty of pecuniary fraud. *Ibid.* The court therefore concluded that "[n]o reasonable jury could have acquitted [petitioners] of pecuniary fraud [on the Forum/Paxton] count but convicted them of honest-services fraud." *Ibid.*

The court rejected petitioners' argument that the jury could have believed that the non-existence of the agreements was an innocent mistake but found petitioners guilty of honest services fraud because they had failed to disclose the payments to the board. Pet. App. 12a-13a. First, the court noted, the trial evidence and closing arguments focused not on the failure to disclose but on whether the non-existence of any agreements was merely an oversight or was instead proof of pecuniary fraud. *Ibid.* More important, the court reasoned, "had the jury believed that a failure to disclose the fees for promising not to compete * * * was honest-services fraud, it would have convicted [petitioners] on all the [Forum/Paxton] fraud counts, because [petitioners] disclosed those fees neither to the board nor to the shareholders; and the jury didn't do that." *Id.* at 13a. Instead, the court noted, the jury acquitted on two fraud counts related to Forum/Paxton, which involved noncompetition agreements that had actually been issued

(by Hollinger's holding company rather than petitioners). *Ibid.*

In concluding, the court further noted that, in light of the entire record, "the evidence of pecuniary fraud [on the Forum/Paxton count was] so compelling that no reasonable jury could have refused to convict the defendants of it." Pet. App. 13a-14a. The court therefore held that the instructional error did not require reversal of petitioners' convictions on that count. *Id.* at 14a.

ARGUMENT

Petitioners contend (Pet. 18-21) that the court of appeals misapplied harmless error review in upholding their convictions for mail fraud on the Forum/Paxton count. In addition, Black argues (Pet. 26-28) that the court of appeals erred in refusing to reverse his obstruction of justice conviction. Those fact-bound contentions lack merit and do not warrant this Court's review. Contrary to petitioners' assertions (Pet. 28-34), the decision below does not conflict with any decision of another court of appeals or with the state court decisions on which petitioners rely. This Court's review is therefore not warranted.

1. a. The court of appeals correctly affirmed petitioners' convictions on the Forum/Paxton count. Pet. App. 11a-14a. In decisions issued before *Chapman* v. *California*, 386 U.S. 18 (1967), which established that constitutional errors can be harmless, this Court had held that a general verdict of guilty must be set aside if the jury was instructed on alternative theories of guilt and "it is impossible to tell" whether the jury relied on a valid or invalid theory. *Yates* v. *United States*, 354 U.S. 298, 312 (1957); *Stromberg* v. *California*, 283 U.S. 359, 368 (1931). Recently, however, the Court held that

alternative theory error may be harmless even in cases in which the jury may have relied on the invalid theory. *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam). In those circumstances, reviewing courts must apply the same harmless error analysis that applies when the trial court fails to instruct the jury on an element of an offense. *Id.* at 532 (citing *Neder* v. *United States*, 527 U.S. 1 (1999)). In *Neder*, the Court held that such instructional errors are harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." 527 U.S. at 18; see *Premo* v. *Moore*, 131 S. Ct. 733, 744 (2011). The Court further held that the government may satisfy that standard by showing that the evidence of guilt was "overwhelming" and either that the defendant did not contest the omitted element or that he failed to present evidence sufficient to support a contrary finding. *Neder*, 527 U.S. at 17, 19.

In this case, application of the overwhelming evidence test was not necessary to uphold petitioners' convictions on the Forum/Paxton count, because the court of appeals concluded that the jury actually found facts establishing petitioner's guilt on that count under the valid pecuniary fraud theory. As the court explained (Pet. App. 12a), petitioners' defense on that count was that the $600,000 that they took from the proceeds of the Forum/Paxton transaction was for *bona fide* non-competition agreements and that their failure to reduce the agreements to writing was an innocent mistake. The jury's guilty verdict necessarily indicates that the jury rejected petitioners' defense and therefore that it believed that there were no non-competition agreements; otherwise, it would have had to acquit. *Ibid.* And if there were no non-competition agreements, then peti-

tioners must have been guilty of pecuniary mail fraud. *Ibid.* As the court further explained, it is not possible that the jury credited petitioners' "innocent mistake" defense but nonetheless convicted them under an honest services theory because of their failure to disclose the payments. *Id.* at 12a-13a. If the jury believed that failure to disclose legitimate fees was honest services fraud, then it would not have acquitted on the other two Forum/Paxton counts, which likewise involved a failure to disclose. *Id.* at 13a.[5]

Unlike in *Yates* and *Stromberg*, in this case it *is* possible to tell that the jury found facts establishing guilt on the valid theory. Accordingly, examination of the strength of the government's proof is not necessary to show that the instructional error was harmless. In *Neder*, the Court implicitly recognized that instructional errors are harmless if the jury must have found facts establishing guilt under correct instructions (although the Court concluded that harmlessness can also be established in other ways). See 527 U.S. at 13-14; *Monsanto* v. *United States*, 348 F.3d 345, 350, 351 & n.6 (2d Cir. 2003), cert. denied, 543 U.S. 831 (2004). The Court referred to that analysis as the "functional equivalence" test— a test that finds harmlessness when the facts necessarily found by the jury are the "functional equivalent" of a finding of guilt on the valid theory. *Neder*, 527 U.S. at 13-14; see also *Carella* v. *California*, 491 U.S. 263, 271 (1989) (Scalia, J., concurring in judg-

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[5] The acquittals on the other two counts make sense, however, if the jury's guilty verdict was based on a pecuniary fraud theory. Unlike the Forum/Paxton count on which the jury found petitioners guilty, the counts on which the jury acquitted involved non-competition agreements (with Hollinger's holding company rather than petitioners) that actually existed. See pp. 6, 11-12, *supra*.

ment). The courts of appeals have routinely applied functional equivalence analysis to find instructional errors harmless, including alternative theory errors. See, *e.g.*, *United States* v. *Brown*, 161 F.3d 256, 259 (5th Cir. 1998); *United States* v. *Hastings*, 134 F.3d 235, 241-242 (4th Cir.), cert. denied, 523 U.S. 1143 (1998); *United States* v. *Washington*, 106 F.3d 983, 1013 (D.C. Cir.) (per curiam), cert. denied, 522 U.S. 984 (1997); *United States* v. *Doherty*, 867 F.2d 47, 57-58 (1st Cir.), cert. denied, 492 U.S. 918 (1989); *Moore* v. *United States*, 865 F.2d 149, 154 (7th Cir. 1989); *United States* v. *Asher*, 854 F.2d 1483, 1496 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989); see also *United States* v. *Skilling*, No. 06-20885, 2011 WL 1290805, at *2 (5th Cir. Apr. 6, 2011). The court below correctly employed that analysis in determining that the instructional error here was harmless as to the Forum/Paxton count, and that case-specific determination does not warrant this Court's review.

b. Although no further analysis was necessary to find the instructional error harmless, the court below—in accordance with the "overwhelming" evidence test endorsed in *Neder*— also examined the strength of the government's case and concluded that the evidence of pecuniary fraud was "so compelling" that a properly instructed jury could not reasonably have failed to find petitioners guilty on that theory. Pet. App. 13a-14a. Petitioners contend (Pet. 18-26) that the court of appeals misapplied that further (but unnecessary) aspect of its harmless error analysis. In particular, petitioners argue that the court failed to focus on what "*this jury*" found and that the court ignored or slighted evidence favoring the defense, deeming the instructional error harmless even though petitioners purportedly presented

sufficient evidence to support an acquittal. Pet. 24-26. Petitioners' argument ignores the court's reliance on the "functional equivalence" test. That test turns precisely on "what the jury *actually* found." *Peck* v. *United States*, 102 F.3d 1319, 1322 (2d Cir. 1996). Those actual findings independently establish that the instructional error was harmless as to the Forum/Paxton count. Thus, even if there were any error in the remainder of the court's harmless error analysis, it would have no effect on the judgment.

In any event, the court of appeals committed no error in the remainder of its harmless error analysis. The court specifically invoked *Pulido* and *Neder*, and it correctly paraphrased the *Neder* standard. Compare Pet. App. 3a ("[I]f it is not open to reasonable doubt that a reasonable jury would have convicted [petitioners] of pecuniary fraud, the convictions on the fraud counts will stand.") with *Neder*, 527 U.S. at 18 ("Is it clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error?"). Although this Court has sometimes articulated the standard as "whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained,'" *id.* at 15 (quoting *Chapman*, 386 U.S. at 24), that formulation is just another way of asking whether it is beyond reasonable doubt that a "rational" or "reasonable" jury "would have" found the defendant guilty absent the error. If the evidence of guilt is so compelling that no properly instructed jury could reasonably have refused to find the defendant guilty, then the error

did not contribute to the verdict. See *Skilling*, 2011 WL 1290805, at *2.[6]

Petitioners' fact-bound disagreement with the court of appeals' application of the *Neder* standard does not warrant this Court's review; and, in any case, the court of appeals correctly applied the standard. Thus, the court held that the instructional error was not harmless as to the APC counts even though "plenty of evidence" supported the conclusion that petitioners committed pecuniary fraud. Pet. App. 10a. The court explained that, in light of the defenses raised by petitioners, it could not determine that the evidence of guilt was "conclusive." *Ibid.* Likewise, on the Forum/Paxton count, the court addressed petitioners' defenses that the $600,000 was for *bona fide* non-competition agreements and that the non-existence of any agreements was attributable to innocent mistake, *id.* at 12a, but the court concluded that, despite petitioners' defenses, "no reasonable jury could have refused to convict [petitioners of pecuniary fraud.]" *Id.* at 14a. The court was not required to discuss item by item all of the evidence presented by the defense to establish that the court had considered that evidence in reaching its conclusion.

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[6] Petitioners are incorrect insofar as they suggest that a finding of harmlessness may rest *only* on what the jury *actually* found. Indeed, in *Neder*, the Court held that a total failure to instruct the jury on an element of a charged offense may be harmless notwithstanding that the jury was thereby "preclude[d] [from giving] any consideration [to] evidence relevant to the omitted element." 527 U.S. at 17-18. If the harmless error analysis was limited to what the jury actually found, there would no need for the *Neder* test in cases involving alternative theory error; instead, the analysis would turn entirely on the *Stromberg-Yates* determination whether it is possible to tell that the jury relied on the valid theory. That would nullify the holding in *Pulido*.

Petitioners identify four factors that the court of appeals purportedly neglected, but none undermines the court's conclusion that no reasonable jury could have failed to find petitioners guilty of pecuniary fraud on the Forum/Paxton count. First, petitioners argue (Pet. 24-25) that the acquittals on other mail fraud charges establish that the Forum/Paxton verdict could not have rested on a finding of pecuniary fraud. That argument overlooks the significant differences between the two sets of charges. The charges on which petitioners were acquitted all involved payments under actual non-competition agreements made in connection with actual sales by Hollinger of newspaper companies that it owned. In contrast, the Forum/Paxton count on which petitioners were convicted involved payments that were labeled non-competition payments even though no non-competition agreements ever existed.

Next, petitioners argue (Pet. 25) that the court of appeals failed to "address" the jury instructions, which allowed the jury to find them guilty of mail fraud based entirely on the invalid honest services theory. But in alternative theory cases in which one theory is determined on appeal to be legally invalid, the jury instructions will *always* have permitted conviction based solely on the invalid theory. If that fact required reversal, alternative theory error could never be harmless absent a finding that the verdict actually rested on the valid theory. Yet *Pulido* held that alternative theory error may be harmless under the *Neder* standard. In any event, the court of appeals plainly considered the jury instructions where they were relevant, because the court relied heavily on the instructions in rejecting the government's harmless error argument on the APC counts. See Pet. App. 9a-10a.

Petitioners also argue (Pet. 26) that the court ignored "exculpatory" testimony by Radler that, when petitioners ordered the $600,000 payments, they believed that non-competition agreements had actually been executed. In fact, however, Radler testified that he and Black ordered the payments only *after* he learned that "there [were] no non-competes." J.A. *Black I* 148a-149a. Radler further testified that Forum and Paxton had not requested non-competition agreements and that he "knew" the $600,000 "payment was wrong." Pet. App. 190a.[7]

Finally, petitioners argue (Pet. 26) that Radler's "clowning note," which the court read as an admission that the non-competition agreements were "fabrications," was equally susceptible to the opposite interpretation. Pet. App. 13a. The court's implicit rejection of that argument was correct, especially in light of Radler's admissions at trial that Forum and Paxton had not requested individual non-competition agreements and no agreements existed. Furthermore, given the other compelling evidence of petitioner's guilt identified by the court of appeals—including the disinterested testimony of officials of Forum/Paxton that they did not request non-competition agreements; the absence of any plausible motive on their part for doing so because petitioners could have had no interest in competing as individuals with small community newspapers; and petition-

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[7] Petitioners incorrectly state that a September 1, 2000, memorandum by Kipnis "confirmed" that the Forum/Paxton deal contemplated non-competition agreements involving individual Hollinger executives. Pet. 26; see Pet. 6-7 n.2. That memorandum concerned another transaction and said nothing about *individual* non-competes in connection with the Forum/Paxton deal. See Pet. App. 321a-322a.

ers' concession that no non-competition agreements actually existed—Radler's note was insignificant.

2. Black's claim (Pet. 26-28) that the court of appeals erred in refusing to reverse his obstruction-of-justice conviction also does not warrant this Court's review.

As an initial matter, Black's argument is based on the mistaken premise that the obstruction conviction must be reversed unless the government proves harmless error under the *Chapman* standard. The *Chapman* standard governs whether a conviction must be reversed when a constitutional error occurred in obtaining *that* conviction. The *Chapman* standard does not govern whether Black's obstruction conviction must be reversed because no court has found that any error occurred in obtaining the obstruction conviction, much less constitutional error. Instead, Black claims that "prejudicial spillover" from an error in obtaining his entirely separate convictions for mail fraud requires reversal of the otherwise valid obstruction conviction. Pet. App. 6a; 130 S. Ct. 2970 n.14.

The "prejudicial spillover" doctrine recognizes that, in certain cases where a defendant has been tried on multiple counts, and his conviction on one of those counts is reversed on a ground that requires dismissal of that count, retrial may be required on other counts because of prejudicial spillover from evidence introduced in support of the dismissed count. See, *e.g.*, *United States* v. *Cross*, 308 F.3d 308, 317 (3d Cir. 2002); *United States* v. *Rooney*, 37 F.3d 847, 856 (2d Cir. 1994). Reversal is not required, however, unless the allegedly prejudicial evidence "would not have been admitted but for the dismissed charges." *United States* v. *Prosperi*, 201 F.3d 1335, 1345 (11th Cir.), cert. denied, 531 U.S. 956 (2000); see *Cross*, 308 F.3d at 317; *United States* v.

Edwards, 303 F.3d 606, 640 (5th Cir. 2002), cert. denied, 537 U.S. 1192 and 537 U.S. 1240 (2003); *Rooney*, 37 F.3d at 855-856.

The defendant has the burden of showing that evidence used to prove the dismissed count would have been inadmissible to prove a remaining count. See *United States* v. *Arledge*, 553 F.3d 881, 896 (5th Cir. 2008), cert. denied, 129 S. Ct. 2028 (2009); *Edwards*, 303 F.3d at 640. If the government has any burden at all, it arises only after the defendant has made that showing. See *Cross*, 308 F.3d at 318 (stating that, if the defendant shows that evidence used to prove the remaining count would have been inadmissible, then the question is whether that "error" was "harmless"); but see *Arledge*, 553 F.3d at 896 (stating that the defendant has the burden to "demonstrate both that the evidence was inadmissible and [that it was] prejudicial") (internal quotation marks and citation omitted); see also *United States* v. *Lazarenko*, 564 F.3d 1026, 1043 (9th Cir.) (the "defendant 'must show compelling prejudice'" (citation omitted)), cert. denied, 130 S. Ct. 491 (2009); *United States* v. *Vebeliunas*, 76 F.3d 1283, 1293 (2d Cir.) (same), cert. denied, 519 U.S. 950 (1996); *Callanan* v. *United States*, 881 F.2d 229, 236 (6th Cir. 1989) (same), cert. denied, 494 U.S. 1083 (1990). Insofar as the government has the burden of proving harmlessness, the applicable standard, as in all cases involving nonconstitutional error in admitting evidence, is not the *Chapman* standard but the standard set forth in *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946) —whether the verdict on the remaining count was "substantially swayed by the error." See *Cross*, 308 F.3d at 318.

Black cannot get past the first step of the prejudicial spillover analysis. Virtually all of the evidence admitted on the fraud counts would still have been admissible if the government had proceeded only on a pecuniary fraud theory. See Pet. App. 6a. Indeed, virtually all of the evidence would have been admissible to prove that Black acted with the "corrupt[] intent" necessary to show obstruction of justice, 18 U.S.C. 1512(c)(1), even if the government had not charged Black with fraud at all. See Fed. R. Evid. 404(b).

In any event, the jury's verdict on the obstruction count was not "substantially swayed" by the erroneous instruction on honest services fraud. Black argues (Pet. 27) that the fraud instruction pushed the jury towards conviction on the obstruction count by creating the mistaken impression that Black was guilty of honest services fraud. But to find Black guilty of obstruction, the jury did not have to find that he *committed* the crimes for which he was being investigated; the jury had to find only that he concealed records for the purpose of subverting an official proceeding. As the court of appeals explained, even if the jury had not been instructed on honest services fraud, "[i]t would still have been the case that Black had known he was being investigated for fraud and could not have known that years later the Supreme Court would invalidate one of the fraud charges." Pet. App. 6a-7a. Moreover, "Black had also to fear—and just as acutely—being prosecuted for pecuniary fraud, as of course he was, and the elements of that crime are unchanged from when he acted." *Id.* at 8a.

As the court of appeals also noted, the "esoteric" instructions that honest services fraud could be based on fiduciary non-disclosure, although erroneous, were not "inflammatory." Pet. App. 6a. And the evidence

that Black committed obstruction, which was "very strong," would have been the same even if he had not been charged with honest services fraud. *Ibid.* With full knowledge of an SEC investigation, a grand-jury investigation, and a criminal investigation closing in on him, Black knowingly removed 13 boxes of pertinent documents from his office, sneaking them out the back after his assistant was prevented from removing them earlier in the day. Black's actions, including his efforts to evade security cameras, were captured on video and played for the jury. Nothing about the erroneous honest services fraud instruction affected the reliability of Black's obstruction conviction. And the court of appeals' case-specific determination to that effect does not warrant this Court's review.

3. Petitioners mistakenly contend (Pet. 29-30) that this Court's review is warranted to resolve a purported conflict between the decision below and decisions of the Tenth and Eleventh Circuits holding that, in alternative theory cases, harmless error review must focus exclusively on the erroneously instructed theory and harmlessness cannot be based on "overwhelming evidence of the properly instructed ground." Pet. 29 (quoting *United States* v. *Holly*, 488 F.3d 1298, 1307 & n.6 (10th Cir. 2007), cert. denied, 552 U.S. 1310 (2008); and citing *Parker* v. *Secretary for the Dep't of Corr.*, 331 F.3d 764 (11th Cir. 2003), cert. denied, 540 U.S. 1222 (2004); *United States* v. *Holland*, 116 F.3d 1353 (10th Cir.), cert. denied, 522 U.S. 902 (1997); and *Adams* v. *Wainwright*, 764 F.2d 1356 (11th Cir. 1985), cert. denied, 474 U.S. 1073 (1986)).

The decisions on which petitioners base their claim of conflict predated this Court's decision in *Pulido*, and *Pulido* abrogated their holdings. In *Pulido*, the trial

court instructed the jury that the defendant could be found guilty of felony murder either if he formed the intent to aid and abet the felony before the murder or if he formed that intent only after the murder. The California Supreme Court ruled that the latter theory was invalid under California law. 129 S. Ct. at 531. This Court held that the instructional error was subject to harmless error review, *id.* at 532, even though a finding of harmlessness could not have been established based on consideration of the invalid theory alone (because a corrected instruction under that theory would have been the same as the alternative valid theory). The Tenth and Eleventh Circuits have not yet had an opportunity to reconsider their precedents in light of *Pulido*.

Moreover, the Tenth and Eleventh Circuit decisions recognize that alternative theory error may also be found harmless based on a functional equivalence analysis, *i.e.*, where "facts necessarily found by the jury encompass the findings required to support a conviction on a valid ground." *Holly*, 488 F.3d at 1306 n.5.; see *Adams*, 764 F.2d at 1362-1363. It is therefore likely that those courts would have reached the same result on the Forum/Paxton count as the court below.

4. Petitioners also err in asserting (Pet. 31-32) that the decision below conflicts with *United States* v. *Brown*, 202 F.3d 691, 701 (4th Cir. 2000), which holds that instructional error is not harmless under *Neder* if the defendant "raised evidence sufficient to support" an acquittal, and with other decisions holding that harmless error review requires consideration of defense evidence that undermines the government's case. See Pet. 31-32 n.6 (citing *United States* v. *Hands*, 184 F.3d 1322, 1330-1331 & n.23 (11th Cir. 1999), and *United States* v. *Manning*, 23 F.3d 570, 575 (1st Cir. 1994), cert. denied,

519 U.S. 853 (1996)). As discussed above, the court of appeals correctly applied the *Neder* standard, taking into account the defense case, and determined that "no reasonable jury could have refused" to find petitioners guilty of pecuniary fraud. Pet. App. 13a-14a. In any event, nothing in *Brown* or the other cases cited by petitioners calls into question the court's alternative determination that the jury actually found facts establishing petitioners' guilt of pecuniary fraud in the Forum/Paxton scheme.[8]

5. Finally, petitioners erroneously argue (Pet. 17, 33-34) that the decision below conflicts with various state court decisions. Petitioners cite those cases for the propositions that the *Chapman* harmless-error standard looks to the basis on which the jury actually rested its verdict and that a court may not find an error harmless under *Chapman* based on the overwhelming weight of the government's proof. But the court below rested its harmlessness determination on the actual basis of the jury's verdict, concluding from the verdict that the jury necessarily found that the Forum/Paxton scheme involved pecuniary fraud. Although the court's harmless error review also took into account the overwhelming strength of the government's case, none of the state decisions that petitioners cite holds that courts may not do so.

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[8] Petitioners contend (Pet. 31) that *Brown* conflicts with dictum in *United States* v. *Jackson*, 196 F.3d 383 (2d Cir. 1999), cert. denied, 530 U.S. 1267 (2000), suggesting that instructional error may sometimes be harmless even if the defendant proffered sufficient evidence to support an acquittal under correct instructions. Any tension between *Brown* and *Jackson* is not implicated here because the court below concluded that the evidence was not sufficient to support an acquittal of pecuniary fraud on the Forum/Paxton count.

Two of the cases, *Lowry* v. *State*, 657 S.E.2d 760 (S.C. 2008), and *Fields* v. *United States*, 952 A.2d 859 (D.C. 2008), actually applied overwhelming evidence analysis. See 657 S.E.2d at 766; 952 A.2d at 866. Moreover, *Fields* expressly recognized that *Neder* endorses an "overwhelming evidence test." 952 A.2d at 863.

Some Florida Supreme Court decisions hold that an error may not be found harmless under the *Chapman* standard based on the overwhelming strength of the prosecution's case when there remains a reasonable possibility that the error affected the verdict. *Cooper* v. *State*, 43 So.3d 42, 43 (2010) (per curiam); *Ventura* v. *State*, 29 So.3d 1086, 1089 (2010); *Rigterink* v. *State*, 2 So.3d 221, 256 (2009) (per curiam), vacated on other grounds, 130 S. Ct. 1235 (2010). But those decisions also make clear that "*close examination of the permissible evidence* on which the jury could have legitimately relied" is a required part of the analysis. *Ibid.* (citation omitted); *Ventura*, 29 So.3d at 1089 (citation omitted). Moreover, the Florida Supreme Court has repeatedly relied on overwhelming evidence of guilt in finding errors harmless. See, *e.g.*, *Hojan* v. *State*, 3 So.3d 1204, 1210, cert. denied, 130 S. Ct. 741 (2009); *Fitzpatrick* v. *State*, 900 So.2d 495, 517 (2005); *Hutchinson* v. *State*, 882 So.2d 943, 952 (2004); *Walton* v. *State*, 847 So.2d 438, 448 (2003); *Chavez* v. *State*, 832 So.2d 730, 754, 762 (2002), cert. denied, 539 U.S. 947 (2003); *Henyard* v. *State*, 689 So.2d 239, 248 (1996), cert. denied, 522 U.S. 846 (1997).

In *People* v. *Hardy*, 824 N.E.2d 953 (2005), the New York Court of Appeals stated that, "however overwhelming may be the quantum and nature of other proof, the error is not harmless . . . if there is a reasonable possibility that the . . . [error] might have

contributed to the conviction." *Id.* at 957-958 (internal quotation marks and citation omitted; brackets in original). In a more recent case, however, that court found constitutional error harmless based on overwhelming evidence of guilt. *People* v. *Wardlaw*, 849 N.E.2d 258, 260 (2006). And the intermediate appellate courts in New York understand *Hardy* to permit consideration of the strength of the government's proof in assessing harmlessness. See, *e.g.*, *People* v. *Trout*, 808 N.Y.S.2d 379, 380 (N.Y. App. Div. 2005).

Similarly, the New Mexico Supreme Court has stated that constitutional error cannot be harmless "simply because there is overwhelming evidence of the defendant's guilt," *State* v. *Alvarez-Lopez*, 98 P.3d 699, 709-710 (2004), and that a constitutional error is not harmless if "there is a reasonable possibility" that it "might have contributed to the conviction." *Id.* at 708 (internal quotation marks and citation omitted). That court has also made clear, however, that the strength of the prosecution's case is an important factor in the harmless error analysis. See *id.* at 710; *State* v. *Stephen F.*, 188 P.3d 84, 94 (2008); *State* v. *Walters*, 168 P.3d 1068, 1077 (2007).

The decision below does not conflict with any of those cases. The court of appeals did not conclude that the instructional error could be harmless even if it could have contributed to the verdict. On the contrary, because the court concluded that the error may have affected the verdict on the APC counts, the court found that the error was *not* harmless as to those counts. Pet. App. 9a-10a. And the court concluded that the error was harmless on the Forum/Paxton count only after finding both that the jury necessarily found facts establishing petitioners' guilt of pecuniary fraud (*id.* at 12a-

13a) and that "the evidence of pecuniary fraud [was] so compelling that no reasonable jury could have refused to convict." *Id.* at 13a-14a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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